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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

NO. 837

JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

Petitioners,

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as directors, officers and stockholders of Monroe Paper Products Company and as Trustees under a Voting Trust Agreement dated December 31, 1953,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD FORD,
Attorney for Respondents, Knapp et al, voting trustees,
1100 Dime Building,
Detroit 26, Michigan.

ARTHUR W. SEMPLINER,
Attorney for Respondents, Knapp et al,
2005 Dime Building,
Detroit 26, Michigan.

FISCHER, SPRAGUE, FRANKLIN & FORD,
KENNETH B. McCONNELL,
Of Counsel,
1100 Dime Building,
Detroit 26, Michigan.

MOSSER, INC., 905 HENRY ST., DETROIT, MICH.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

Petitioners have omitted one of the reported opinions:

In re Securities & Exchange Commission (C.A. 6, 1955), 226 F 2d 501; nine printed copies filed herewith.

Counter-Statement of Question Presented

The Court of Appeals has reversed a partial summary judgment and remanded the case for trial on the merits. The question is whether there has been such an error by the Court of Appeals as to justify review in this court.

Counter-Statement of the Case

Since the prime question here is as to whether there is a dispute of fact meriting a trial, we state our version of the facts in some detail. References are to the certified record filed in support of the present certiorari application, unless otherwise indicated.

Monroe Paper Products Company is a Michigan corporation operating a paper mill at Monroe, a small town near Detroit (20a, 98a, 236a). Nearly all of its stock was owned locally (175a, 236a). It had a large cash surplus (113a, 237a). In 1953 the executors of a deceased stockholder's estate first sought unsuccessfully to take over the company management, then sought to dispose of their holdings (101a-103a, 171b). National Container Corporation campaigned unsuccessfully for options on a majority of the stock (106a, 253a-258a). There was a proxy fight (106a-110a). In October, 1953 about 40% of the stock was acquired by petitioner Waterbury Corrugated Container Company, a Connecticut paper firm (111a). This stock so acquired was partly that which had been optioned to National Container Corporation, and partly that which had belonged to the deceased large stockholder (106a, 111a, 112a). The other petitioners (Kinsey and Kunkel) are Waterbury officers and each are nominal holders of a few of its shares. There were threats that petitioners would acquire more stock and take over (101a-103a, 114a). There is evidence that petitioners were operating on borrowed money and intended to use the company's cash to repay their own loans (127a, 133a, 136a, 141a, 146a, 238a, 242a-243a, 245a).

The local stockholders proceeded to organize a voting trust. This voting trust was immediately joined by about 300 stockholders, being more than 80% of record stockholders and owning about 52% of the company's outstanding stock (162a, 175a-176a, 238a-240a, 148b, 189b). Waterbury stayed out of the voting trust, as did also a few small stockholders who have remained indifferent to the dispute. The members of this trust designated the present respond-

ents as their voting trustees and delivered to them their stock certificates in exchange for negotiable voting trust certificates (85a, 116a). Most of the subscribers lived in or about Monroe, and all except 36 resided in Michigan (175a). No original member of this voting trust has ever attacked it (240a). The voting trust certificates were not registered with the Securities and Exchange Commission nor validated by the Michigan Securities Commission (49a, 116a-118a, 136a).

By its terms the trust provided that it would not become effective unless and until more than 50% of all outstanding stock, was subscribed thereto (79a, 249a). By February 1, 1954, more than 50% had been so subscribed (116a, 258a).

The next day the petitioners (the Waterbury Company and its two officers) began the present suit, in effect asking that the voting trust be invalidated because it had made it impossible for them to acquire a majority of the stock (60a, 63a). To this claim was joined a supposed derivative cause of action charging mismanagement of the corporation (70a-71a). Thereafter and while suit was pending the petitioners solicited members of the voting trust and by paying high prices ($19.00 per share in some instances) they were able to purchase enough voting trust certificates so that if the corresponding stock were withdrawn from the trust, the trust would have slightly less than 50% and the petitioners would have slightly more (144a-145a, 230a-234a, 260a, 261a, 74b-75b, 148b). The voting trust certificates so acquired were afterwards tendered by petitioners to voting trustees with a demand for a surrender of the corresponding stock, which was refused (414b-415b). Thereafter, by amendment to their complaint, the petitioner brought their purchase of voting trust certificates into the case; but not, however, until more than a year had elapsed from the time when the voting trust certificates were issued (13a).

The case came to trial before District Judge Lederle and petitioners recovered a large judgment. This judg-

ment the Court of Appeals reversed on May 1, 1956 because of an extraordinary series of errors (*Knapp v. Kinsey* (C.A. 6, 1956) 232 F 2d 458; see also *In re Securities & Exchange Commission* (C.A. 6, 1955) 226 F 2d 501, filed herewith). The appellate court held that respondents had not received a fair hearing before an impartial judge. The case was remanded with directions that it be tried before a different judge, and on October 3, 1956, the District Court reassigned it to Judge Picard (15a).

Instead of proceeding to trial, the petitioners consumed more than a year with a motion for rehearing (denied 235 F 2d 129), a certiorari application to this court (denied 352 U.S. 892) and various interlocutory proceedings (15a-16a), and on June 12, 1957 moved for a partial summary judgment dissolving the voting trust. Respondents filed affidavits of merit (174a-183a) and referred to their sworn answers to requests for admissions (174a, 177a, 169b-201b) and to some of the depositions on file. On July 30, 1957 the motion for summary judgment was granted (*Kinsey v. Knapp* [E.D. Mich. 1957] 154 F. Supp. 263) though apparently not on the basis that petitioners wanted, since all parties appealed.

Contrary to respondents' contentions, the District Judge decided that the voting trust certificates had been the subject of a public offering within the meaning of the Federal Securities Act and should have been registered. Notwithstanding petitioners' contentions, he declined to rule that failure to register made the voting trust void per se. Contrary to petitioners' contentions, he held that the voting trust did not on its face and without proof of more facts violate any Federal or State statute against restraint of trade. Contrary to petitioners' contentions, he held that all claims of fraud, misrepresentation and abuse of fiduciary position involved disputed issues of fact and must await trial. Contrary to respondents' contentions, he held that as transferees of some of the voting trust certificates the petitioners were assignees of a right of rescission and entitled to rescind the trust and withdraw their certificates. He accordingly ordered the trust broken up and the pe-

titioners put in control of the company. He certified his judgment under Rule 54(b) but said:

> "We do not hold that it is not possible that the proofs might alter our decision as to whether or not this trust agreement is void or voidable on the facts." (154 F. Supp. 263 at 270; petitioners' appendix 148.)

The effect of this partial summary judgment would have been to oust the company's present management and install petitioners in their place. There remains undisposed of the respondents' sworn counter-claim (142a-150a) charging the petitioners with conspiracy to acquire control of the company for improper and illegal purposes. Such counter-claim has been traversed by the petitioners (152a-155a) and now stands for trial. As the Court of Appeals has observed (249 F. 2d 797 at 803; petitioner's appendix 158-161) the question of control should be decided when the whole case is decided on its merits.

The Court of Appeals has now held that respondents are entitled to an opportunity to show as a fact that there was no public offering; that the rights of petitioners cannot be determined without full exploration of all contested facts; that the issues are so intertwined that the case should be tried and determined as a unit rather than by piece-meal hearing and piece-meal appeal of selected issues; and the case has been remanded for trial (*Knapp v. Kinsey* [C.A. 6, 1957] 249 F. 2d 797, petitioners' appendix 149). A rehearing was asked and denied and application is now made to this court for statutory certiorari (No. 837) common law certiorari (No. 583) and mandamus (No. 584).

We now proceed to contradict some of petitioners' assertions of particular facts to emphasize the extent of the factual dispute:

There was no company policy to buy stock for retirement. There was no obligation on any officer or director to buy stock for the company except an authorization to buy from any stockholder who might be in distress and be

unable to find a market, the stock being unlisted and little traded in on most occasions. Petitioners' activities having created an unprecedented market, both factions regarded the authorization as no longer in force; in fact, petitioners' faction threatened litigation if any stock was bought for the treasury. Petitioner Kinesy is a director and has been buying stock personally; so have the directors aligned with him (132a, 160a-161a, 214a, 216a, 219a-221a, 169b-170b).

The "escrow" was an arrangement made with a bank by third parties who were stockholders and also employees of the company, whereby friends of the management faction might deposit money and it would be used to purchase any stock that might be offered for sale by any stockholder who might want to sell his stock at the price being offered by National Container Corporation but who did not want to sell to National Container (108a-109a, 179b-180b). The petitioners' faction had a rival escrow for buying from stockholders who were willing to sell to National Container provided their stock was immediately bought rather than optioned (113a, 134a, 228a-230a, 179b-180b).

The purpose of the voting trust was not to corner the market in the stock or to manipulate stock prices (114a-115a, 180a-181a, 216a-218a, 222a, 183b-184b). The law office memorandum which petitioners quote is not a fair statement of facts (161a-162a, 184b).

As to the so-called Huber letter (79a) which invited stockholders to join the voting trust: It was never sent to, seen by, or relied on by, the petitioners (116a, 128a, 176a). No recipient claims to have been misled by it. It contains no material misrepresentation of fact (177a). The stockholders named in the letter as having already signed the agreement had in fact committed themselves in writing that they would sign as soon as the agreement was printed, and they all did so (116a, 162a, 177a). The only ones to complain are the petitioners, who first filed the complaint charging misrepresentations and then went out and bought voting trust certificates.

No company time or company funds were ever used to organize or support the voting trust (116a).

For the fiscal year ended June 30, 1956, the company's actual loss was $40,694 and not $79,382 (207a, 31b). In the year ended June 30, 1957 there was some improvement and the actual loss was only $13,369.13 (207a).

As to there being some error of form in the affidavit of merit, the District Judge held that the point was too technical to necessitate any amendment (185a) and he had before him at the same time much other sworn showing on behalf of respondents (depositions, answers to requests for admissions, etc.).

ARGUMENT

The plaintiffs moved for a summary judgment for a variety of reasons (restraint of trade, violation of fiduciary duties, fraud, etc.) based on what the District Judge called

> "facts alleged that to me don't amount to a hill of beans" (June 26, 1957, Transcript p. 185)

and which were met by sworn denials. As to all these grounds the District Judge refused summary judgment and reserved the plaintiffs' contentions for trial. His action in this respect is not at this time reviewable, not being final:

> *John Hancock Mutual Life Ins. Co. v. Kraft* (C.A. 2, 1952) 200 F 2d 952;
> *McGrath v. Hunt* (C.A. 2, 1952) 194 F 2d 529;
> *Morgenstern Chemical Co. v. Schering Corporation* (C.A. 3, 1950) 181 F 2d 160;
> *Jones v. St. Paul Fire and Marine Ins. Co.* (C.A. 5, 1939) 108 F 2d 123.

But whether reviewable or not, it is obvious that the trial court was strictly correct in refusing to decide such issues (all disputed) in advance of full hearing.

The plaintiffs also moved for a summary judgment upon the following complicated theory: The voting trust certificates were part of a public offering and should have been registered; because they were not registered they were voidable; because they were voidable they could be bought with notice by the plaintiffs after suit was started and made the basis for the destruction of the voting trust in this present litigation, the statute of limitations notwithstanding. This theory involved the fact question of whether the offering had been public, on which there was a dispute as to the facts; and it involved doubtful legal questions as to whether the right of rescission created by the Federal Securities Act is assignable at all, or is assignable in favor of a purchaser with notice, or was un-

der the odd circumstances here ever assigned at all, and if so, whether there can be recovery on the basis of such a cause of action acquired after bringing suit. The District Judge apparently overlooked the disputed fact issue and resolved these legal questions in favor of plaintiffs without particular discussion; in any event he entered a partial summary judgment dissolving the voting trust and putting plaintiffs in possession of the company. The present appeal followed, a supersedeas bond of $100,000 being posted.

The Court of Appeals has now vacated the summary judgment and remanded the case for trial, and it is to review this action that the present certiorari application is made. We read the Court of Appeal's opinion as holding the following:

(a) The affidavit of merit demonstrated the existence of factual issues on which evidence must be heard before the question of a public offering can be answered (petitioners' appendix 153, 155-7). The intent of the Federal Securities Act being to protect innocent purchasers, and plaintiffs being purchasers with notice, all dispute as to the facts and circumstances of their purchase must be eliminated before their position can be determined (petitioners' appendix 160).

(b) Defendants are entitled to a trial upon their counterclaim and their affirmative defenses of plaintiffs' fraud, conspiracy and unclean hands, before the management elected by the stockholders are evicted and the plaintiffs put in possession (petitioners' appendix 159).

(c) The entire case is complex, with a large number of related and disputed factual and legal issues. It involves a great deal of money and the rights of many people. The record is inadequate. One issue cannot fairly be divorced from all other issues. There has been no attempt at an unbiased judicial survey of the whole case. The nature of the controversy is such that the case should be tried as a unit and all relevant facts fully developed (petitioners' appendix 158-160).

(d) The court would like a more adequate statement of the District Judge's views as to assignability of rights of rescission under the Federal Securities Act, the effect of the Statute of Limitations, and the availability of a cause of action brought in after bringing suit (petitioners' appendix 161).

(e) The court has added no *dicta* as to how it would have decided any of the legal questions had they been properly presented to it on an adequate record and with petitioners' alleged facts established. This seems to be the main grievance of which the certiorari petition complains, and it is the whole subject of the companion mandamus petition (No. 584).

Where controlling facts are in dispute, there can be no summary judgment. For this proposition the Court of Appeals has cited several decisions in its opinion, and we add only *Colby v. Klune* (C.A. 2, 1949) 178 F 2d 872:

> "We have in this case one more regrettable instance of an effort to save time by an improper reversion to trial by affidavit, improper because there is involved an issue of fact turning on credibility."

Cases presenting features found here are not suitable for summary judgment, and courts in their discretion frequently refuse it until they can be more fully informed: *Skelly Oil Co. v. Phillips Petroleum Co.* (1949), 339 U.S. 667 at 678

> "We are not restricted to disposition of the controversy on so truncated a treatment of the issues that underlie the record. * * *
>
> "Accordingly, we think that the proper disposition requires that we vacate the judgment as to Magnolia and remand the case in order that the Court of Appeals either itself or by sending the case back to the District Court can further explore, through ways that may be appropriate, the issues which have been laid bare."

Price v. Johnston (1947), 334 U.S. 266 at 291:

> "Appellate Courts cannot make factual determina-

tions which may be decisive of vital rights where the crucial facts have not been developed."

Kennedy v. Silas Mason (1947), 334 U.S. 249 at 257:

"No conclusion in such a case should prudently be rested on an indefinite factual foundation. The case which counsel have described as a constantly expanding one, comes to us almost in the status that it comes to a trial court. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine. * * * But summary procedures, however, salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice. We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

See also:

Gulf Power Company v. Local Unions Nos. 676 and 1078 (C.A. 5, 1956) 229 F 2d 655;

Loudermilk v. Fidelity and Casualty Co. (C.A. 5, 1952);

Glenn v. Southern Cal. Edison Co. (C.A. 5, 1951) 187 F 2d 318;

U.S. v. Bethlehem Steel Corp. (S.D. N.Y. 1958) F. Supp. , 25 F.R.S. 56 c. 47, Case 1.

The Court of Appeals found that there were disputed issues of fact which made the trial court's summary judgment improper. The Court of Appeals found no error in the trial court's conclusion that there were issues of fact

which made it impossible for him to enter any summary judgment on other issues or other theories. Out of its acquaintance with the litigation (three previous considerations) the Court of Appeals added the directive to try the case in its entirety and not endeavor to dispose of it piecemeal in view of the way in which the claims, counterclaims, and defenses are intertwined. The issue proffered to this court by the present petition can only be: Has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision? (Rule 19:1:b)

The petitioners seem to think that they have an absolute right to try their case piece-meal if that favors their grand strategy. Though the rules permit it in some situations, it is alway discretionary and requires examination of the particular case and balancing of convenience as regards court, plaintiffs, defendants, and witnesses. *Panichella v. Pennsylvania Railroad Company* (C.A. 3, 1958) ..... F 2d ..... , 25 FRS 54 b.31, case 2, in speaking of the related problem of disposing of a case in small bits by entering partial judgments, says:

> "We start with the familiar and generally accepted conception that Section 1291 of Title 28 of the United States Code * * * is an authoritative application and implementation of a basic and persisting policy against piece-meal appeals * * * ordinarily an application for a 54(b) order requires the trial judge to exercise considered discretion, weighing the overall policy against piece-meal appeals against whatever exigencies at hand may present * * * The power which this rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of public policy indicated by statute and rule * * * To state these factors is to make it apparent that, far from presenting hardship or unfairness justifying discretionary departure from the normal rule as to the time of appeal, this case bristles with considerations

which reinforce the normal rule. We think the District Court did not view in proper perspective the problem presented by an application for a special order under Rule 54(b). Had it done so, we think it could not have avoided the conclusion that the application should be denied."

Conmar Products Corp. v. Lamar Slide Fastener Corp. (S.D. N.Y. 1942) 50 F. Supp. 1019 at 1021:

> "The facts are such that the determination of any one issue would not dispose of the entire litigation, nor would it save the time of the court or substantially lighten the burden of the litigants. Accordingly, no useful purpose would be served by a separate trial of any of the issues."

Kelley Island Lime & Transport Co. v. City of Cleveland (N.D. Ohio, 1942), 47 F. Supp. 533 at 538:

> "It is a principle founded on clear thinking that where possible, causes of action are not to be divided and courts are not to be compelled to try the same issues several times."

Chappell v. Santangelo (D. Conn., 1939) 30 F. Supp. 599:

> "I see no danger of prejudice from one inclusive trial. And delays would be fostered, rather than prevented, by separate trials. Indeed, the multiplicity of separate trials would frustrate the liberal provisions of Rule 20(a) as to permissive joinders. The rule recognizes the economy of a procedure whereunder several demands arising from the same occurrence may be tried together, thus avoiding the reiteration of the evidence relating to facts common to the several demands."

The certiorari petition points out the regrettable fact that the voting trust by its terms will expire December 31 next, so that it may be impossible or at least difficult to have a trial and another review in the Court of Appeals before part of this litigation becomes moot. Correct as this may be, it furnishes no reason for resolving disputes of fact by weighing affidavits instead of testimony, and no

reason for advisory opinions on legal questions presented in a vacuum. The retrial of this case was ordered May 1, 1956 (232 F 2d 458), and petitioners have maneuvered ever since to avoid trial. When the retrial was again ordered on December 6, 1957 (249 F 2d 797) the District Judge fixed February 18, 1958 as the trial date. Had he gone forward with that program the trial would have been over by now; but at petitioners' instance the trial setting was vacated because of the present certiorari application.

The following time-table will speak for itself as to who wants the delay and who has produced most of it:

February 2, 1954—case filed. The voting trust had 4 years and 11 months to run.

February 2, 1954-October 12, 1954—petitioners taking nearly 5000 pages of discovery depositions (in most instances several depositions taken of each witness).

October 12, 1954-June 2, 1955—trial in progress, with some intermissions. Until November 5, 1954 argument as to petitioners' first motion for summary judgment. Thereafter about two months devoted to petitioners' campaign against the Securities and Exchange Commission. The Timbers appeal, 226 F 2d 501.

June 2, 1955-August 4, 1955—under advisement; then judgment for petitioners.

August 4, 1955-December 12, 1955—judgment for petitioners removed to Court of Appeals, record and briefs filed, argument on appeal.

December 12, 1955-May 1, 1956—under advisement by Court of Appeals; then judgment reversed and case remanded for trial before a different judge, 232 F 2d 458. The voting trust had 2 years and 8 months to run.

May 1, 1956-July 19, 1956—no retrial because of petitioners' motion for rehearing. Rehearing denied, 235 F 2d 129.

July 19, 1956-November 5, 1956—no retrial because of petitioners' application to this court for certiorari. Denied.

352 U.S. 892. The voting trust had 2 years and 2 months to run.

November 5, 1956-April 22, 1957—no retrial because of proceedings on 928 requests for admissions filed by petitioners, and upon amended pleadings of petitioners.

April 22, 1957—pre-trial hearing.

June 12, 1957-July 30, 1957—petitioners' motion for summary judgment filed; argued; under advisement; granted, 154 F. Supp. 263.

July 30, 1957-October 21, 1957—appeal; record and briefs filed; argument.

October 21, 1957-December 6, 1957—under advisement by Court of Appeals; reversed and remanded for trial, 249 F 2d 797. The voting trust had 1 year and 1 month to run.

December 6, 1957-January 31, 1958—no retrial because of petitioners' motion for rehearing. Rehearing denied.

January 31, 1958-March 5, 1958—no retrial because of petitioners' application for stay of proceedings pending application to this court. The voting trust now has 9 months to run.

March 5, 1958- .....—no retrial because of order obtained by petitioners staying proceedings until this court rules on their certiorari application.

The petitioners could have tried this case at any time since May 1, 1956. Instead they have consumed two entire years in what they call an effort to save the court's time. As said in *Gray Tool Co. v. Humble Oil & Refinery Co.* (C.A. 5, 1951) 186 F 2d 365:

> "* * * this is another of those all too numerous instances of the misuse of the summary judgment procedure to cut a trial short; * * * The use of it (summary judgment) here for shortcutting the trial did not, it could not, accomplish that result, because it did not, it could not, dispose finally of the issues

tendered. *All that it could possibly accomplish was, by setting up a temporary road block, to postpone the determination of the merits of plaintiff's suit and thus cause the trial to drag its already slow length still further along.*" (Italics added)

Trial is still possible before the end of the year; but should certiorari be granted and full review be had in Washington with this argument probably next October the remaining time will be still further diminished.

Petitioners seem to feel that on the appeal from Judge Picard's summary judgment the Court of Appeals might have decided the whole case on the merits on the basis of the record which had been filed on the earlier appeal from Judge Lederle's decision. Clearly the court could not have done so without violating all accepted practice. The testimoney before Judge Lederle was never put in evidence before Judge Picard, and of course would not have been admissible except as to absent witnesses. On the previous appeal the Court of Appeals had been obliged to discard all the proceedings before Judge Lederle as being so loaded down with bias, prejudice and misconduct of counsel as to present no picture at all of the merits of the case (232 F 2d 458; petitioners' appendix 117-132). In the long interval since May 1, 1956 petitioners could easily have tried the case a second time. Instead they spent the entire time in trying to get judgment without trial, with the result that the Court of Appeals received a record consisting of little more than the pleadings.

It would be unusual for this court at this time to search all the depositions and affidavits to see whether it is possible to contradict the Court of Appeals' finding of a dispute meriting full hearing. But since petitioners brief the matter at such length we summarize our position as follows:

We have offered to show that the voting trust certificates were never offered to the public and were offered only to a limited and well-informed group of stockholders able to fend for themselves without the formalities of a

registration statement (116a). We have filed the affidavit of two witnesses to this effect (175a). If the witnesses are to be believed, there was no public offering and no need of registration: *Securities and Exchange Commission v. Ralston Purina Company*, 346 U.S. 119 at 122; *Campbell v. Degenther* (W.D. Penn., 1951) 97 F. Supp. 975. Unless petitioners concede the point they must go to trial on it.

It is hard to see how petitioners could benefit even if there had been a public offering without registration. The Federal Securities Act creates a very limited right of rescission (15 U.S.C.A. 77(1); *Frost v. Coeur d'Alene Mines Corp.*, 312 U.S. 38).The language of the statute suggests that the right of rescission was not intended to be assignable, and it has been so held (*Woghan v Stevens*, 236 Wis. 132, 294 N.W. 503). If the local law governs, no right of rescission is assignable in Michigan: (*Cochran Timber Co. v. Fisher*, 190 Mich. 478; *Grand Trunk Western Railway v. Nelson* (C.C.A. 6, 1941) 116 F 2d 823 at 836). The claim that original voting trust depositors first rescinded and then sold a cause of action to petitioners is exploded by the deposition of petitioners' agent Fleishman (231a-234a) who says he first bought voting trust certificates at a high price and then had the sellers sign letters asking for the return of their stock. No person who exchanged his stock for voting trust certificates has ever brought any action.

Since petitioners never bought any voting trust certificates until after they had filed suit complaining of the failure to register them, they are purchasers with notice and are not the innocent investors whom the Federal Securities Act was intended to protect: *Pennsylvania Co. For Assurances, etc. v. Deckert* (C.C.A. 3, 1941) 123 F 2d 979; *Cady v. Murphy* (C.C.A. 1, 1940) 113 F 2d 988, cert den. 311 U.S. 705). The well-settled rule has always been that a plaintiff cannot recover on a cause of action which he bought in while suit was pending: *American Bonding & Trust Co. v. Gibson* (C.C.A. 6, 1906) 145 Fed. 871. Petitioners did not plead any cause of action based on their purchase of voting trust certificates until after the statutory limitations period expired, and respondents then pleaded the Statute of Limitations.

It is at least doubtful whether there was any requirement for the validation of the voting trust certificates under the Michigan Securities Act (C.L. 1948, Sec. 451.102), but in any event a violation of that statute raises no cause of action in favor of a purchaser with notice: *DePolo v. Greig*, (1954) 338 Mich. 703; *Moore v. Manufacturers Sales Co.*, 335 Mich. 606; *Schrier v. B & B Oil Co.*, (1945) 311 Mich. 118.

The voting trust agreement provided that the trustees might terminate the trust before its normal expiration date by selling the entrusted stock, any such sale to be at not less than $15.00 per share (90a). This does not violate any state law against restraint of trade: *S-K Oil Co. v. Mac's Auto Mart*, (1951) 329 Mich. 351. Being in the nature of instructions from principal to agent, it does not violate the Sherman or Clayton Acts: *Federal Trade Commission v. Curtis Publishing Company* (1922) 260 U.S. 568; *U.S. v. Colgate & Company* (1918) 250 U.S. 300.

We pass by the portion of petitioners' brief which charges that there were misrepresentations of fact in connection with the organization of the voting trust. This has been repeatedly denied on oath (174a-183a). We renew our repeated invitation to petitioners to try to prove it at a fair trial.

As to breach of fiduciary duties supposed to be apparent on the face of the papers: The voting trust agreement imposes on the trustees the duty of voting the stock so as to promote the good management of the company (93a-94a) which is not inconsistent with the duty of a director. There was no duty "to secure $15.00 per share solely for the depositing stockholders" and there was no duty to purchase stock for the corporation (90a, 132a, 214a-216a, 219a-221a, 169b-170b).

CONCLUSION

This case presents none of the features which are usually thought to justify a certiorari application. There has been no error in what has been decided below and no refusal to pass on any issue properly presented and necessary for decision. We urge that this application be denied. We are filing separate briefs in opposition to the mandamus and common law certiorari motions.

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Respectfully submitted,

RICHARD FORD,
Attorney for Respondents.
Knapp et al, voting trustees.
1100 Dime Building.
Detroit 26, Michigan.

ARTHUR W. SEMPLINER,
Attorney for Respondents.
Knapp et al,
2005 Dime Building,
Detroit 26, Michigan.

FISCHER, SPRAGUE, FRANKLIN
& FORD,
KENNETH B. McCONNELL,
Of Counsel,
1100 Dime Building,
Detroit 26, Michigan.